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No. 00-1375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2000

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ
Petitioners
v.
ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY
Respondents

On Petition for a Writ of Certiorari to the Illinois Supreme Court

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BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITIONERS

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Multilateral Treaties Deposited with the Secretary-General (electronic version), Chap. III 2

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the United Mexican States (hereinafter, "Mexico") is a party to the Vienna Convention on Consular Relations. As a party, Mexico has an interest in securing compliance with rights guaranteed under Article 36 of the Convention by all states parties, both for its own nationals and for nationals of any other state party. As a member of the community of nations, Mexico has an interest in assuring compliance by all states with their obligations under treaties protecting individual rights. Under customary law and the International Covenant on Civil and Political Rights, states (1) must extend the protection of their laws to foreign nationals in their territory, (2) must avoid acts contributing to discrimination based on race or national origin, (3) accord fair treatment to detained foreign nationals, in particular in capital cases. Consent has been granted to the filing of this Brief. See Appendix.

RESERVATION

Nothing in this Brief shall be construed as a waiver of the immunity to which Mexico is entitled by virtue of international law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, or any immunity or privilege established by the Vienna Convention on Consular Relations, 21 U.S. Treaties 77; Treaties and Other International Acts Series 6820; 590 United Nations Treaty Series 261, and the Consular Convention between the United States and The United Mexican States, 57 Stat. 800; TS 985; 9 Bevans 1076; 125 United Nations Treaty Series 301, or of any defense, right, or immunity which Mexico may have a right to assert. It also will not imply a submission to the jurisdiction of the United States.

SUMMARY OF ARGUMENT[1/]

The Illinois Supreme Court acknowledged that Article 36 of the Vienna Convention on Consular Relations was violated,

1/ No part of this Brief was written by a party.

because Mr. Madej was not informed, upon his arrest, that he had a right to contact consular officials of Poland. Despite this violation, Mr. Madej was convicted of capital murder and sentenced to death. In such a circumstance, a reversal of both conviction and sentence is required. A court may not interpose a requirement that prejudice be shown as a condition for reversal. Nor may it invoke rules of procedural default to avoid providing a remedy.

ARGUMENT

I
THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY PROTECTION FOR FOREIGN NATIONALS

The Vienna Convention on Consular Relations is the major worldwide treaty governing consular relations, regulating all aspects of the relationship of foreign consuls to a host government and setting the framework for a consul's activities. The result of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, the Vienna Convention has been ratified by 165 nations. ***Multilateral Treaties Deposited with the Secretary-General***, Chap. III. Mexico, like both the United States and Poland, attended the 1963 conference, ratified the resulting treaty, and is a party. The Vienna Convention "was undoubtedly the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention." Luke T. Lee, ***Consular Law and Practice***, at 26.

Article 36 of the Vienna Convention requires a host state to facilitate access between detained foreign nationals and consulates of the sending state, in particular by informing a detainee promptly upon detention of the right of access. The rationale underlying Article 36 of the Vienna Convention is that a foreign national is disadvantaged when left to navigate the

foreign county's legal system in the absence of support from his home nation, even if he is represented by competent local counsel. An exposition of the many ways in which a consul can assist a conational is found in the U.S. State Department's ***Foreign Affairs Manual***. Section 421 requires regular visitation. Section 421.3 sets forth the purposes of regular visitation:

> (h) To impress upon host country prison directors that the U.S. Government is sincerely interested in the welfare of its incarcerated citizens, no matter what the charges against them might be or of what they were convicted. (i) To maintain liaison and nurture rapport and a cooperative relationship with host country prison directors, law enforcement officials, prosecutors and judges. (j) To let the prisoners themselves know that their government has a sincere interest in their physical and emotional well-being.

Section 423.3 establishes the case worker concept, and requires that:

> To the extent possible the same consular officer should visit a prisoner regularly. There are several advantages to such a 'case worker' approach. The consular officer becomes thoroughly familiar with the specific facts and problems of the prisoner's situation. This should enable the officer to become responsive in the maximum degree to the prisoner's needs, not only small services, but also for effective liaison with attorneys, court officials, and prosecutors. . . .

The State Department's view of consular services obviously encompasses matters beyond the development and presentation of evidence. The ***Foreign Affairs Manual*** also calls for continued liaison services for convicted prisoners engaged in appeals (§ 433) and continued regular visitation of prisoners at intervals "at least once every three months." Luke Lee, ***Consular Law and Practice***, at 169-71.

The importance of consular assistance to a detainee in a criminal case is indicated by the practice of U.S. consular officials in protecting the rights of Americans detained abroad. In instructions issued to consular officials, the State Department says:

> "In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners." *Overseas Citizens Services*, §411, in 7 ***Foreign Affairs Manual*** (chap. 400, July 18, 1980), also in ***Digest of United States Practice in International Law*** (Washington, D.C., 1980), and in Luke T. Lee, ***Consular Law and Practice***, at 166. "Upon receiving notification that an American citizen is being detained, it is absolutely essential that the post achieve timely access to the detainee . . . ." *Id.* §412.

U.S. consular officials are further instructed to inform the detained American in detail about the processes they face. "Posts should prepare an information packet covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules. The purpose of this material is not to usurp the function of legal counsel or encourage a 'do it yourself' approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure attorney performance. Such informational material should be updated regularly." *Id.* §413.4.

II
REVERSAL IS REQUIRED IF A CONVICTION FOLLOWS NON-COMPLIANCE WITH ARTICLE 36

If a criminal conviction is secured in absence of compliance with Article 36 of the Vienna Convention, the

conviction must be reversed. The violation is at once of the rights of the detainee, and of those of the foreign state, here Poland. Both violations must be remedied by the courts. In the first case to reach this Court in which a foreigner's treaty-guaranteed rights were violated by a state of the United States of America, the Court required compliance with the treaty. The treaty in question was that by which the United States of America gained its independence from Great Britain. The treaty required respect for the property rights of British nationals. A Virginia statute had been adopted to confiscate the property of British nationals. When a British national sued to regain his property, the Supreme Court struck down the Virginia statute, thereby vindicating the rights both of Great Britain and of the British national. ***Ware v. Hylton***, 3 U.S. (3 Dall.) 199 (1796).

In criminal cases as well, this Court has taken remedial action to ensure compliance with a treaty. In ***United States v. Rauscher***, 119 U.S. 407 (1886), the Court refused to allow a prosecuting attorney to charge an additional offense against an individual surrendered to the United States under an extradition treaty for another offense, because to do so would violate the treaty under which the man had been surrendered.

The practice of this Court as reflected in ***Rauscher*** is consistent with obligations imposed under the Vienna Convention itself. Article 36 of the Vienna Convention requires remedial action by the courts of state parties. In the second paragraph of Article 36, the state parties agree that their courts will secure strict compliance with the first paragraph of Article 36. The second paragraph states:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

This language requires domestic judicial implementation that ensures that "full effect" be given to the purposes of the right of

notification. "Full effect" is not given to the purposes of the right of notification if a conviction is allowed to stand despite a failure to notify.

Even apart from Article 36, paragraph 2, of the Vienna Convention, a remedy is required by international customary law, which operates as a complement to treaty obligations in this situation. If a treaty imposes obligations but does not specify remedies in the event of breach, such remedies are provided by international customary law. In the event of breach, if it is physically possible to restore the situation as it stood prior to the violation, such is required. A state that commits an internationally wrongful act must, to the extent possible, restore the *status quo ante*. This norm has been explained and put into draft treaty form by the International Law Commission, the United Nations body that drafts treaties. As stated by the International Law Commission, the required remedy is restitution in kind, often referred to in its Latin version, *restitutio in integrum*. *Draft Articles on State Responsibility*, article 43, ***Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996***, United Nations General Assembly Official Records, Supplement No. 10, at 142, U.N. Document A/51/10 (1996). As regards consular access, this requirement means that if a person has been convicted in violation of the right to be informed of the right of consular access, the conviction must be reversed.

III
WHEN ARTICLE 36 IS VIOLATED, PREJUDICE IS PRESUMED

Mexico can indicate to this Court that, according to its information, intervention by Mexican consuls has been a decisive factor, in a number of cases, in keeping Mexican nationals from being sentenced to death. However, such results are irrelevant to the issue before this Court. Under Article 36 of the Vienna Convention, there need be no showing in a particular case, before

remedial action is ordered, that a different result would have been achieved through consular intervention.

Article 36 was written into the Vienna Convention on the presumption that a failure to inform a detained foreign national of the right of consular access effected an injury to that individual in the exercise of the right of criminal defense. Indeed, there can be no other reason why the states participating in the drafting conference included such a provision. They were concerned that, unless detaining authorities made it clear to detained foreign nationals that they have a right of consular access, and that the detaining authorities are prepared to facilitate contact with a consular officer, a fair criminal process could not be assured.

Moreover, after a person has been convicted without having been informed of the right of consular access, it is difficult to determine what effect a consul may have had on the proceedings, since the variety of consular activity is great, and one never knows what a consul might have done in a particular case. In addition, if the courts were to undertake such an examination, they would need access to consular records and the testimony of consuls, both of which are privileged under consular law. Once it is determined that there has been a violation of the right to notice and consular access, relief should be granted to the accused without further inquiry.

The need to restore the *status quo ante* is particularly acute in capital cases. Article 6 of the International Covenant on Civil and Political Rights requires protection of the right to life, stating: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." In the context of a capital case, this provision means that a death sentence must be reversed if all procedural requirements have not been met.

The Human Rights Committee, which was established under the International Covenant on Civil and Political Rights to monitor compliance, has ruled that in capital cases, Article 6

requires heightened regard to procedural requirements, and that if such requirements are not scrupulously observed, the imposition of a death penalty is rendered "arbitrary" within the meaning of Article 6. Communication No. 353/1988, ***Lloyd Grant v. Jamaica***, Report of the Human Rights Committee, Vol. II, United Nations General Assembly, U.N. Document A/49/40 (1994), at 57; Communication No. 377/1989, ***Anthony Currie v. Jamaica***, Report of the Human Rights Committee, Vol. II, United Nations General Assembly, U.N. Document A/49/40, at 78.

The purpose of the Article 36 notification requirement is not to discriminate against the nationals of the receiving state by giving foreign nationals greater protection, but rather to assure that foreigners are afforded equal guarantees in exercising the right of defense. From these considerations it follows that a requirement of a finding of prejudice aggravates the situation of disadvantage in which a detained foreign national finds him- or herself, in particular in capital cases.

IV
THE INTER-AMERICAN COURT OF HUMAN RIGHTS HAS CONSTRUED ARTICLE 36 TO REQUIRE REVERSAL OF A CAPITAL SENTENCE IMPOSED FOLLOWING A VIOLATION OF ARTICLE 36

The obligation to reverse a capital conviction was affirmed by the Inter-American Court of Human Rights in an advisory opinion the Court issued at the request of Mexico. ***The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law***, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, October 1, 1999. Mexico asked the Court to give an opinion on consular notification in capital cases. The Court stated that Article 36 provides a right that the individual may invoke before a domestic court, and that the relevant information must be communicated at the time the person is first deprived of liberty. Para. 106.

A failure to provide that information, said the Court, is a violation of due process, since the accused is conclusively presumed to be disadvantaged and must be placed on a par with others through access to a consulate. Para. 120. The Court said that, for an accused person, "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person." Para. 121. The Court said that the right to be informed of the right of consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights." Para. 123. The Court said that imposition of a death sentence without compliance with Article 36 is an arbitrary deprivation of life, in violation of the International Covenant on Civil and Political Rights, and of the American Convention on Human Rights. Para. 137.

V
ILLINOIS RULES ON DEFAULT CANNOT BE APPLIED

The Illinois Supreme Court refused to entertain Petitioner's Article 36 claim on the ground that he had not raised it in accordance with Illinois rules of procedure. The violation of a right guaranteed by a treaty between sovereign nations is not, however, subject to the considerations that allow a state court to refuse to entertain a claim. The Supremacy Clause, Article VI, cl. 2, was written into the Constitution precisely to prevent the states from thwarting the operation of treaties. In the context of action by the states in contradiction to treaty obligations, this Court has recognized that a case involving a treaty obligation is a case of the highest priority. In nullifying the operation of a Virginia statute on the basis of a treaty obligation, this Court said, "The case is of very great importance . . . because the effect and operation of the treaty are necessarily involved." ***Ware v. Hylton***, 3 U.S. (3 Dall.) 199, 221 (1796). This is not to say that, where the treaty has been given full effect, i.e., where notice to the detainee is provided and consular access allowed, states rules of procedural default could

not be given effect. However, procedural default cannot be used to negate the treaty obligations of the United States.

The Illinois courts must remedy the treaty violation if the issue is presented to them. Here, they failed to do so. In order to ensure compliance with the treaty obligation, Mexico respectfully urges this Court to direct the Illinois courts to provide a remedy.

VI
CONCLUSION

The courts must entertain claims based on Article 36 of the Vienna Convention on Consular Relations. Rules of default of claims cannot be invoked by a court to refuse to remedy a violation. A failure to remedy the instant violation of the Vienna Convention on Consular Relations at the earliest opportunity perpetuates the breach of duty that has been committed here. A criminal conviction obtained after Article 36 of the Vienna Convention on Consular Relations is violated must be reversed.

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CERTIFICATE OF SERVICE

On May 1, 2001, three copies each of this Brief were served by first class mail, postage prepaid, on Douglass Cassel, 357 E. Chicago Ave., Chicago IL 60601, counsel to Petitioner Consul General; Charles F. Smith, 333 W. Wacker Dr., Suite 2100, Chicago IL 60606, counsel to Petitioner Madej; Arleen C. Anderson, Assistant State's Attorney, 2650 S. California, Chicago IL 60608, counsel to Respondents.

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APPENDIX A-1
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Petitioners

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Respondents

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

CONSENT OF RESPONDENTS TO FILING

Undersigned counsel to Respondents hereby consents, pursuant to Rule 37 of this Court, to the filing of a brief *amicus curiae* in support of Petitioners by the United Mexican States.

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APPENDIX A-2
No. 00-1375
IN THE
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